IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 10122 of 1993

For Approval and Signature:

Hon'ble MR.JUSTICE KUNDAN SINGH

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1. Whether Reporters of Local Papers may be allowed to see the judgements?

2. To be referred to the Reporter or not?

3. Whether Their Lordships wish to see the fair copy of the judgement?

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder?

5. Whether it is to be circulated to the Civil Judge?

A N SHAH

Versus

STATE OF GUJARAT

Appearance:

MR Deepak C Rawal for MR ANAND for Petitioner

MR C.C.Bhalja, Assistant Government Pleader for the Respondents.

CORAM : MR.JUSTICE KUNDAN SINGH

Date of decision: 12/08/98

ORAL JUDGEMENT

By means of this petition, the petitioner has sought for quashing the order dated 9.3.93 passed by the Deputy Secretary (Revenue Department), State of Gujarat, at Annexure "J" to the petition, compulsorily retiring the petitioner from service. The petitioner

joined service as a clerk on 15.12.1956. He was promoted to the post of Deputy Mamlatdar in the year 1965 and thereafter as Mamlatdar on 12.11.86. While the petitioner was working as Deputy Mamlatdar in the office of the Special Land Acquisition Officer, Mahi Canal Kadana Command Area,Nadiad, an application dated 21st October,1984 was moved against him by a subordinate clerk cum typist Ms. I.P.Shingodia and her statement was recorded by the Deputy Collector on 23.10.84. She stated that she had resumed on 15.12.84. As she was a resident of Junagadh, she was attending her duties from residence of her relative. On 18.10.84, the petitioner and Ms. Shingodia had gone to Mamlatdar's office at Anand for election work of his area. After returning from there at about 5.30 p.m., at the Nadiad office, he prevented Ms. Shingodia in the office upto 8.30. On that day, after 6.00 p.m., there was no one present except the petitioner and Ms. Shingodia. One Harvinderbhai Mistry arrived there to pickher. He was sent to another room for bringing some file. The petitioner asked Ms. Shingodia what was the work of that person, he will drop her by a scooter. Ms. Shingodia did not give any reply, but she was permitted to leave the office with her relative at 8.30 p.m.. Ms.Shingodia was called for election work on 21.10.84, Sunday at about 12.00 noon at Nadiad office. She attended the office accordingly. Both the petitioner as well as Ms. Shingodia were sitting facing to each other on the same table. There was no other person in the office at that time. After completing the work of writing election register which the petitioner had given to her at about 12.30 p.m., the petitioner asked her to bring water from adjacent water room in which a pot was kept. She had gone to that room for taking water. Before she could come out of that room, after getting water, the petitioner reached inside the room and had closed the door of the room and applied stopper from inside. Despite that, she had opened the door by pushing it after opening the stopper. Before she could come out of the room, the petitioner had given her a push due to which Ms. Shingodia had stuck with a table inside the room. Thereafter, once again the petitioner had closed the room by applying the stopper. At that time, in a sudden fear, Ms.Shingodia started crying loudly. Smt. Shantaben P Pandya, residing in the adjacent room came running. At that time, the petitioner was unable to talk anything or behave inside the room. On knocking the room by Ms. Pandya, the petitioner immediately opened the door and therefore, she had embraced Smt.Shantiben Pandya. At that time, the petitioner had gone to his table. Smt. Pandya took Ms.Shingodia to her room. At about 1.30 p.m., the petitioner had gone to the room of

Smt.Pandya and asked Ms.Shingodia to go alongwith him at Anand, but she did not agree to go with him at Anand and he went to Anand by closing the office. Thereafter at about 2.00 p.m., she alongwith her relatives met Shri Amarsingh Vaghela, an MLA, and Collector of Nadiad with regard to this incident.

3. On the complaint being made on 21.10.84 by Ms. Shingodia to the Collector, the Resident Deputy Collector,Kheda recorded the statements of the complainant and witnesses. After statement of the petitioner on 23.10.84, a show cause notice dated 19.11.84 was issued to the petitioner by the Collector, Kheda district. The petitioner filed his reply dated 3.12.84 to the show cause notice. A memorandum dated 29.8.85 was issued to the petitioner regarding charges of teasing and harassing Ms.Shingodia. The petitioner submitted his explanation dated 17.9.85 to the charges levelled against him. The Collector, Kheda passed an order dated 24.6.86 withholding of two increments of the petitioner in the cadre of Deputy Mamlatdar without future effect. The petitioner was promoted as Mamlatdar on 12.11.86. The petitioner preferred an appeal before the Tribunal against the order dated 24.6.86 whereby two increments of the petitioner were withheld. The Service Tribunal by its order dated 26.5.87 set aside the order dated 24.6.86of the Collector in Appeal no. 534 of 1986 with a direction to release the increment forthwith and for a finding of punishment disproportionate, directed for a full-fledged inquiry. On the basis of the observations made by the Tribunal in the order dated 26.5.87, the State Government passed an order dated 10.9.1987 reverting the petitioner from the post of Mamlatdar to the post of Deputy Mamlatdar. The petitioner filed Special Civil Application no. 5479 of 1987 before this Court challenging the reversion order dated 10.9.l987 in which the petitioner was granted ad-interim stay order. Lateron the said Special Civil Appliction No. 5479 of 1987 was allowed by this Court and quashed the reversion order dated 10.9.87. In the month of August 1989, the Government started full-fledged inquiry in respect of the incident which had taken place on 18th and 21st October,1984. Statements of the witnesses were recorded. The petitioner also submitted his explanation. The Inquiry officer submitted his report dated 27th September,1990 wherein none of the charges levelled against the petitioner were proved. The disciplinary authority did not agree with the report of the inquiry officer and the petitioner was held guilty by the disciplinary authority by an order dated 5th October,1991. On the basis of the same evidence, after

arriving at a different finding in respect of the incident of 1984. The petitioner was issued a show cause notice. The petitioner submitted his explanation dated 12.12.91. The disciplinary authority passed the order dated 9th March, 1993 compulsorily retiring the petitioner which order is at Annexure "J" and the petitioner has challenged that order in the present petition.

4. The learned counsel for the petitioner challenged thie impugned order of compulsory retirement mainly on the following four grounds.

1. The inquiry officer came to the conclusion that the story of Ms. Shingodia and Shantaben Pandya was nothing except a concocted story and held that none of the charges was proved against him.
2. The disciplinary authority did not agree with the conclusions of the inquiry report and his findings.
3. The disciplinary authority has not directed the inquiry officer to re-consider the matter in a particular manner accepting or rejecting the evidence, but the findings of the inquiry report have not been accepted. As such it is a case of no evidence.

For this purpose he relied on the cases of S.M.Sharma vs.South Gujarat University reported in 23(1) GLR, 233; Bhagwati Prasad Dube vs. The Food Corporation of India, AIR 1988 SC, 434.

5. The learned Assistant Government Pleader took me through the statements of witnesses as well as other evidence to show that some incident had taken place as alleged by Ms. Shingodia on the date and time alleged. The Inquiry officer has rejected the evidence of the witnesses on flimsy grounds. It is not in dispute that the disciplinary authority can take a different view on the basis of the evidence on record. In the present case also, the disciplinary authority has rejected the reasonings and conclusions arrived at by the inquiry officer and accepted the evidence of the victim as well as her witnesses.

7. The learned counsel for the petitioner further contended that the punishment awarded to the petitioner is disproportionate and arbitrary. Firstly the order of punishment was passed withholding two

increments of the petitioner. Secondly, the reversion order and lastly compulsory retirement. The order of reversion was quashed by this court in Special Civil Application no.5479 of 1987. Hence, the penalty imposed upon the petitioner by the disciplinary authority is disproportionate and arbitrary. He placed reliance on the decision in the case of SN Sharma vs. South Gujarat University, reported in 1982 (1) GLR, 233, wherein it is laid down that the age, maturity, antecedents,family background, motivation, socio-economic factors,role played in the commission of mal-practice or unfair practice etc., are all factors which must enter into account in the quantification of penalty in disciplinary jurisdiction even in the academic field. Besides, though penalties are imposed with the end in view of creating a deterrent effect, the current thinking is penology even in the context of hardened criminals is that reformation and curative technology are also as much a part of penalty procedures as retribution. This thinking must be reflected with greater force in the disciplinary, jurisdiction exercised by the academic bodies who deal with delinquents qua whom they are in loco parentis.

In the present case, without considering all these factors, the disciplinary authority has pased the order of compulsory retirement of the petiioner.

8. I have carefully considered the arguments of the learned advocates for the petitioner. But this argument is not entertainable inasmuch as the Tribunal has considered the gravity of the conduct of the petitioner and taking advantage of the subordinate official and it found that it is a case in which penalty imposed by the authority concerned was insufficient. Hence, directed the inquiry officer to initiate full-fledged inquiry and take necessary action and after considering the entire facts and circumstances of the case, the disciplinary authority passed an order of compulsory retirement.

9. The learned counsel for the petitioner further submitted that no notice was served to the petitionerby disciplinary authority regarding proposed punishment to be awarded to the petitioner. The proposed punishment should be inflicted within the rules of natural justice and the delinquent officer should be entitled to know the proposed punishment and should have been given an opportunity of making a representation. In the present case, the petitioner was not served with a notice required under Rule 10(4)(1)(b) of the Gujarat

Civil Service (Discipline and Appeals) Rules, 1971 intimating him about proposed punishment, when such notice of punishment is in violation of the principles of natural justice. He relied on a decision in the case of Union of India vs. Mohmmed Ramzan Khan AIR 1991, SC, 471. His further submission is that the petitioner has also not been supplied with confidential letter no.TEQ-2592/1411-E dated 12th February, 1993 of the Public Service Commission as required under Rule 26. Rule 26 of the aforesaid Rules requires a copy of advice by the Commission and where such advice has not been accepted also, a true statement of reasons for such non-acceptance shall be furnished to the Government servant concerned alongwith a copy of the order passed by the authority making an order. Rule 10(3) requires the disciplinary authority to pass an order imposing any penalty. In case if it considers it necessary to consult the Commission, record of inquiry shall be forwarded by the disciplinary authority to the Comission for its advice and such advice shall be taken into consideration before making any order imposing any penalty on the Government servant. In the present case, admittedly, this documenthas not been supplied to the petitioner by the disciplinary authority.

7. Sub-rule (4) of Rule 10 requires that in case any penalty is specified in item nos. 4 to 8 of Rule 6 should be imposed on the Government servant, it shall make an order imposing such penalty and it shall not be necessary to give Government servant an opportunity of making representation on the penalty any proposed to he imposed provided in every case where it is necessary to consult the Commission, the record of the inquiry shall be forwarded by the disciplinary authority to the Commission for its advice and the advise shall be taken into consideration before making an order imposing any such penalty as may be imposed on the Government servant. Provisions of Article 311(2) of the Constitution require that no person shall be dismissed by removal or reduced in rank except after an inquiry in which he has been informed of the charges against him and giving him a reasonable opportunity of being heard in respect of those charges, provided where it is proposed after such inquiry to impose upon him, any such penalty may be on the basis of the evidence adduced during such inquiry and it shall not be necessary to give such person any opportunity for making representation on the penalty proposed. Whle the Supreme Court in the case of Union of India and others vs. Mohmmed Ramzan Khan, reported in AIR 1991 SC, 471, while dealing with the provisions of Article 311(2) of the Constitution held as under:

"With the Forty-Second Amendment, the delinquent officer is not associated with the disciplinary inquiry beyond the recording of evidence and the submissions made on the basis of the material to assist the Inquiry Officer to come to his conclusions. In case his conclusions are kept away from the delinqauent officer and the Inquiry Officer submits his conclusions with or without recommendation as to punishment, the delinquent is precluded from knowing the contents thereof although such material is used against him by the disciplinary authority. The report is an adverse material if the Inquiry Officer records a finding of guilt and proposes a punishment so far as the delinquent is concerned. In a quasi-judicial matter, if the delinquent is being deprived of knowledge of the material against him though the same is made available to the punishing authority in the matter of reaching his conclusion, rules of natural justice would be affected.

Deletion of the second opportunity from the scheme of Article 311(2) of the Constitution has nothing to do with providing of a copy of the report to the delinquent in the matter of making his representation. Eventhough the second stage of the inquiry in Article 311(2) has been abolished by amendment, the delinquent is still entitled to represent against the conclusion of the Inquiry Officer holding that the charges or some of the charges are established and holding the delinquent guilty of such charges. For doing away with the effect of the inquiry report or to meet the recommendations of the Inquiry Officer in the matter of imposition of punishment, furnishing a copy of the report becomes necessary and to have the proceeding completed by using some material behind the back of the delinquent is a position not countenanced by fair procedure. While by law application of natural justice could be totally ruled out or truncated, nothing has been done by the 42nd Amendment which could be taken as keeping natural justice out of the proceedings and the applicability of the rules of natural justice to such an inquiry is not affected by the 42nd amendment. Therefore, supply of a copy of the inquiry report alongwith recommendations, if any, in the matter of proposed punishment to be inflicted would be within the rules of natural justice and the

delinquent would, therefore, be entitled to the supply of a copy thereof. The Forty-Second Amendment has not brought about any charge in his position."

6. The division bench of this Court in the case of T S Rabari vs. Government of Gujarat reported in 32(2) GLR, 1035 has held that the delinquent officer is entitled for the report of inquiry including all the documents, statements and materials on which reliance is placed bythe disciplinary authority. In the case of State Bank of India vs. D.C.Aggarwal reported in AIR 1993 SC,1197 it has been held as under:

"Taking action against an employee on confidential document which is the foundation of order exhibits complete misapprehension about the procedure that is required to be followed by the Disciplinary Authority. May be that the Disciplinary Authority has recorded its own findings and it may be confidential that reasoning and basis of returning the finding of guilt are same as in the CVC report but it being a material obtained behind back of the respondent without his knowledge or supplying of any copy to him the High Court in our opinion did not commit any error in quashing the order."

8. It is not in dispute that the petitioner was not given a notice of proposed punishment to be imposed upon him. It is also not disputed that the petitioner was not provided with the report item no. 10 mentioned in the order of compulsory retirement dated 12.2.93 of Public Service Commission. The Disciplinary Authority did not consider it necessary take advice of the Public Service Commission prior to passing of the impugned order of punishment. Public Service Commission submitted its report dated 12.2.93 stated above and that report was also relied on in awarding the punishment to the petitioner, but no copyof that letter has been furnished tothe petitioner. In view ofthe rule laid down by the Supreme Court, the disciplinary authority is required to furnish a copy of that document-confidential letter of the Commission and should have issued notice of proposed punishment to make a representation within a stipulated period against the proposed punishment.

8. In view of the above facts and circumstances stated above, the disciplinary authority has not complied with mandatory requirement laid down by

the rules and regulations and principles of natural justice as held by the Supreme Court. The impugned order of disciplinary authority is not sustainable in the eye of law and the disciplinary proceedings should be initiated as per the procedure provided by Rules.

9. The learned advocate for the petitioner also relied on the decision in the case of 1991(1) GLR, 1153 to show that once an order of compulsory retirement is quashed by this Court, services of the petitioner should be directed to be treated as continuous. The facts of the said case are fully applicable to the facts of the present case.

9. Accordingly, the petition is allowed and the impugned order dated 9.3.93 passed by the Deputy Secretary, Revenue Department, respondent no. 1 is hereby quashed and set aside. As a consequence, the petitioner is ordered to be reinstated in service with continuity of service, within two months from the date of production of certified copy of this judgment and pay him all arrears of pay and all other consequential benefits . The petitioner's services are treated to be continuous without any break. No order as to costs.

However, the disciplinary authority is at liberty to re-start the disciplinary proceedings from the stage requiring it to provide a copy of item no.10-confidential letter dated 12.10.93, to the petitioner and other documents which are relied on in passing the order of punishment, issue show cause notice and providing an opportunity to make a representation to the petitioner within a stipulated period against proposed punishment, if any. If the petitioner files any representation against proposed punishment, if any, the respondent authority will consider the same and pass an appropriate order in accordance with law.

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